

FEDERAL CIRCUIT COURT OF AUSTRALIA

NGOC v MINISTER FOR IMMIGRATION & ANOR

[2016] FCCA 1014

Catchwords:

MIGRATION – Administrative Appeals Tribunal (Migration & Refugees Division) – Partner Provisional (Class UF) visa – whether Tribunal failed to comply with s.359A of the Migration Act – whether the Tribunal failed to complete the exercise of its jurisdiction – no jurisdictional error identified – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 476

Migration Regulations 1994, reg.1.15A

Cases cited:

Huynh v Minister for Immigration (2015) FCA 701

Applicant:	LE THI NHU NGOC
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 3458 of 2014
Judgment of:	Judge Street
Hearing date:	29 April 2016
Date of Last Submission:	29 April 2016
Delivered at:	Sydney
Delivered on:	29 April 2016

REPRESENTATION

Counsel for the Applicant:	Mr L Karp
Solicitors for the Applicant:	My T Nguyen Solicitors
Counsel for the First Respondent:	Mr D Hughes
Solicitors for the First Respondent:	DLA Piper Australia

ORDERS

- (1) The amended application annexed to the submissions of the applicant is treated as properly filed and served.
- (2) The name of the second respondent is amended to the Administrative Appeals Tribunal and the filing of any further document in this regard is dispensed with.
- (3) The amended application is dismissed.
- (4) The applicant pay the costs of the first respondent fixed in the amount of \$6825.
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 3458 of 2014

LE THI NHU NGOC

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application for a Constitutional writ within the Court's jurisdiction under s.476 of the *Migration Act 1958* (Cth) in respect of a decision the Tribunal made on 2 March 2014 affirming the decision of the delegate not to grant the applicant a Partner Provisional (Class UF) visa. The visa applicant husband is a citizen of Vietnam and arrived in Australia on a student visa on 22 April 2009. The visa applicant husband met the review applicant in June 2009, and they were legally married on 12 August 2012.
2. On 29 September 2010 the visa applicant husband and his two children applied for a partner visitor partner visa with the review applicant as

the sponsor. In order to be eligible for a partner visa, it was necessary that a delegate of the Minister and/or the Tribunal be satisfied that the husband was the “spouse” of an Australian citizen at the time of the application and at the time of decision. The term “spouse” is defined in s.5F of the *Migration Act 1958* as follows:

(1) For the purposes of this Act, a person is the spouse of another person if, under subsection (2), the 2 persons are in a married relationship.

(2) For the purposes of subsection (1), persons are in a married relationship if:

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

3. Section 5F(3) requires the meaning of “spouse” to take into account the considerations identified in reg.1.15A, which are as follows;

(1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

(a) a Partner (Migrant) (Class BC) visa; or

(b) a Partner (Provisional) (Class UF) visa; or

(c) a Partner (Residence) (Class BS) visa; or

(d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

(ii) the living arrangements of the persons; and

(iii) any sharing of the responsibility for housework; and

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being married to each other; and

(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and

(iii) any basis on which the persons plan and undertake joint social activities; and

(d) the nature of the persons' commitment to each other, including:

(i) the duration of the relationship; and

(ii) the length of time during which the persons have lived together; and

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons see the relationship as a long-term one.

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

4. On 22 October 2012 a delegate of the Minister decided to refuse the application on the grounds that the delegate was not satisfied the applicant and husband were in a genuine relationship. The delegate identified the inconsistent accounts as to their financial circumstances, which the delegate found to be untruthful. The delegate was not satisfied that the review applicant had met the visa applicant husband's parents or their relatives or that their relatives viewed the relationship as genuine. On 9 November 2012 the applicant sought a review of the delegate's decision.
5. The Tribunal held two hearings, the first on 22 September 2013, at which the applicant appeared to give evidence and present arguments, and a second hearing on 30 October 2014, at which the applicant and her husband participated over the telephone. The Tribunal relevantly concluded that the parties had not given truthful evidence about their financial circumstances and made adverse findings in relation to the criteria in respect of the meaning of "spouse". The Tribunal concluded that it was not satisfied on the evidence that at the time of the application the parties had a mutual commitment to a shared life as husband and wife or that it was a genuine continuing relationship for the reasons set out earlier in the decision of the Tribunal.

6. Mr Karp of counsel sought leave to rely upon an amended application. That leave was granted. The amended application identifies the following two grounds:

2. The Tribunal erred in failing to comply with s. 359A of the Migration Act.

Particulars

(a) Information given by Ms Le and said to be inconsistent with that given by the visa applicant (Mr Nguyen) was not given to Mr Nguyen, he being and “applicant” in the proceedings before the Tribunal within the meaning of s. 359A of the Migration Act.

3. The Tribunal failed to complete the exercise of its jurisdiction;

(a) Failure to consider the opinion of Dr Dang Nguyen, psychiatrist, to the effect that in his opinion Ms Le’s mental illness was brought on by the possibility or prospect of her husband being returned to Vietnam, in the contexts of s. 5F(2) of the Migration Act and Migration Regulation 1.15A(3)(d).

7. Ground 1 of the amended application was abandoned. In relation to ground 2, counsel for the applicant properly conceded that this Court was bound by a decision of the Federal Court of Australia in *Huynh v Minister for Immigration* (2015) FCA 701 at 45 to 68. It was in those circumstances that counsel for the applicant put a formal submission to preserve the applicant’s rights in another forum.
8. That was an entirely proper course for counsel of the applicant to take, and for the reasons identified in *Huynh v the Minister for Immigration* supra, ground 2 of the amended application cannot succeed.
9. On behalf of the applicant Mr Karp carefully developed an argument focusing upon medical evidence that was provided to the Tribunal from a Dr Dang Nguyen. That consultant psychiatrist had provided three reports to the Tribunal, the first dated 7 May 2013, in which, relevantly, the consultant psychologist said:

My differential diagnosis would be major depression with psychotic features or paranoid schizophrenia on a background of stresses related to the husband’s residency status.

10. That report identified the applicant of having symptoms since she was in year 12 and referred to the applicant's paranoid delusions and that she used to drink heavily three years ago. The next report dated 25 June 2013 in substance identified the same history and identified the same differential diagnosis. The third report dated 8 October 2013 referred to the applicant presenting to the consulting psychiatrist in May 2013, following which she had been treated for major depression. That report referred to the fact that in year 12 the applicant had a similar episode in reaction to stress of not getting her own way, though she was not treated that time. The consulting psychiatrist opined:

I feel her illness is recent in reaction to the possibility of her husband being sent back to Vietnam.

11. The report continued:

She states she is not getting any better despite the increase in medications, but when asked of her what exact medications it is she is not clear but stated that she felt increasingly headaches and nausea and has stopped taking medication.

12. Mr Karp of counsel put that the Tribunal in making reference to the applicant's medical condition took that into account in evaluating the credibility of the applicant and her evidence in reaching the adverse findings made by the Tribunal. It was submitted that the Tribunal did not comply with the mandatory requirements under reg.1.15A(d) by considering whether the applicant's depressive illness which the consulting psychiatrist had suggested was related to the possibility of her husband returning to Vietnam was a factor to be taken into account as to the nature of the participants' commitment to each other under reg.1.15A(d).

13. The Tribunal's decision is not to be read with a keen eye for error. The Tribunal clearly turned to the considerations required consistent with the mandatory obligation under reg.1.15A, and in particular (3)(d). The Tribunal relevantly said:

The Tribunal has considered the evidence before it, and whilst it accepts that the parties are known to each other, have some familiarity with each other's circumstances, he considers that that marriage and relationship has been created solely for migration purposes.

14. The Tribunal found that:

The evidence relating to the parties' commitment does not support a finding that they derive a level of companionship and emotional support from each other; or that they see the relationship as a long-term relationship.

15. The above reference to the considerations under reg.1.15A(d) to the Tribunal having considered “the evidence before it” is not something that should be read with an eye for error. The submission that the Tribunal had not taken into account the medical evidence before the Tribunal is without substance. Mr Karp of counsel pointed to the heading “Other Matters”, and that the analysis referred to by the Tribunal of the medical information was one leading the Tribunal taking into account the medical information when assessing the applicant’s evidence.
16. In substance, Mr Karp submitted that the inference that should be drawn is that the Tribunal did not take into account that material in respect of the medical condition of the applicant in performing the function under reg.1.15A(3)(d), and therefore that the Tribunal did not properly exercise its jurisdiction and committed jurisdictional error.
17. Reading the Tribunal’s decision as a whole and without a keen eye for error, I regard the reference by the Tribunal to having considered the evidence before it as meaning that the Tribunal took into account medical evidence that was before the Tribunal. It was not necessary for the Tribunal to refer to every piece of evidence. I do not regard the absence of reference by the Tribunal under the heading “Nature of Persons”, “Commitment to Each Other” and the separate analysis found under the heading “Other Matters” as supporting an inference the Tribunal did not take into account the medical evidence before it in performing its consideration of the mandatory matters, relevantly under reg.1.15A(3)(d).
18. Further, I should add that this was a case in which the applicant had given direct evidence as to her allegation as to the commitment of the parties to the relationship. It was not an identified integer of the applicant’s claims that her relationship or commitment was to be measured by reference to her depression or her reaction to the possibility of her husband returning to Vietnam.

19. The applicant's medical condition was one which the applicant had referred to in her own statutory declaration. That medical condition was not one described by the applicant in the statutory declaration as being a measure of her commitment to her husband. More importantly, that medical condition was one in which the applicant swore a declaration on 1 April 2013, referring to her medical condition and noting that the Tribunal had a medical certificate in relation to the applicant's medical condition.
20. That medical certificate was one dated 12 March 2013, in which a Dr Dang Nguyen identified that the applicant had been having paranoid ideation for years, which escalated when she was under stress. That report referred to the applicant's depression and her husband having been refused an application to stay permanently in Australia, which, it was suggested, had caused her to become stressed and depressed. The only reference in the applicant's legal representative to the medical information appears to be referable to alleged delay in handing down the decision. On 18 September 2014, the applicant's legal representatives said:
- The delay in handing down a decision is causing a lot of stress to our client, who suffers from depression.*
21. There is no submission apparent on the material before the Court that the medical condition was a relevant consideration that would require to be taken into account under reg.1.15A(3)(d). Even if, contrary to the finding I have made above, a different view were held as to whether the Tribunal had taken into account the medical opinion of the consulting psychiatrist in relation to reg.1.15A(3)(d), it was not a consideration either arising from submissions or apparent on the papers that the Tribunal should have taken into account.
22. The proposition that the applicant's illness demonstrates the applicant's commitment to the other partner is not a matter that arose on the face of the material before the Tribunal. In substance, I consider ground 3 to be an impermissible challenge to the adverse findings of fact made by the Tribunal in relation to whether the parties had a genuine and continuing relationship. Ground 3 of the amended application fails to make out any jurisdictional error.

I certify that the preceding twenty-two (22) paragraphs are a true copy of the reasons for judgment of Judge Street

Date: 11 May 2016